<u>आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई</u>

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, CHENNAI

श्री चंद्र पूजारी, लेखा सदस्य एवं
श्री चल्ला नागेन्द्र प्रसाद, न्यायिक सदस्य के समक्ष
BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER &
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
आयकर अपील सं./ **I.T.A. No.1044/Mds/2014**
(निर्धारण वर्ष **/** Assessment Year : 2009-2010)

M/s. The Willingdon Charitable Trust, No.603, 6th floor, Rani Seethai Hall, Chennai 600 006.	Vs	The Director of Income Tax Exemptions, Chennai
[PAN: AAATT 0683N] (**अपीलार्थी**/Appellant)		(**प्रत्यर्थी**/Respondent)

अपीलार्थी की ओर से / Appellant by : Shri. S. Sridhar, Advocate
प्रत्यर्थी की ओर से / Respondent by : Shri. N. Rengaraj, IRS, CIT.

सुनवाई की तारीख/Date of hearing : 16.04.2015
घोषणा की तारीख /Date of Pronouncement : 15.05.2015

<u>आदेश / O R D E R</u>

<u>PER CHANDRA POOJARI, ACCOUNTANT MEMBER</u>

This appeal by assessee is directed against the order of the Commissioner of Income Tax (Exemptions), Chennai u/s.263 of the Income Tax Act, vide order dated 31.03.2014.

2. The ground in this appeal with regard to assumption of jurisdiction of Commissioner of Income Tax and thereafter, observing that there is failure on the part of the Assessing Officer to apply the correct provisions of law to the facts of the assessee case, and hence passed the assessment for the year 2009-2010 both ''erroneous" and ''prejudicial to the interest of Revenue" and direct the Assessing Officer to make fresh assessment after keeping in view the law relating to charity in provisos to Section 2(15) of the Income Tax Act with effect from 01.4.2009 and issue of application of accumulated income of assessment year 2004-05 within the stipulated period upto 31.03.2008.

3. The ld. Counsel submitted that the Assessing Officer had completed assessment by taking a consistent view that the assessee was a charitable trust and income from Kalyanamandapams, Auditoriums, Working Women Hostel and Hostel for Girls is not liable for tax.

4. The ld. Counsel submitted that the activities are carried on by the assessee which is instrumental to the object of the assessee**.** According to ld. Counsel the Assessing Officer had gone into the details

of the activities of the trust and taken the conscious decision that income of the assessee from Kalyanamandapams, Auditoriums, Working Women Hostel and Hostel for Girls are not liable for taxation. He submitted that the decision taken by the Assessing Officer is in conformity with the earlier order of the Tribunal in assessee's own case and Judgment of hon'ble High Court in assessee's own case in *DIT(E) vs. Willington Charitable Trust* 330 ITR 24, wherein it was observed that sec 11(4A) of the Act does not exclude sec 11(4). The exemption u/s.11(4A) would be available only when the business was incidental to the attainment of the object of the trust". Therefore, the matter is to be remitted to the Assessing Officer to decide as to whether the said business income is used for the object, in accordance with law.

5. He also submitted that the Assessing Officer has adopted one course of possible view under law when two views are possible. The ld. Counsel submitted that the Commissioner of Income Tax is not right when he held that the assessment order is both ''erroneous" and ''prejudicial to the interest of Revenue". He relied on the various judgments for this proposition especially *in CIT vs. Max India Ltd (243 ITR 83) (SC).* He submitted that merely because the assessee earned profits, it would not be deciding factor to conclude that assessee engaged in trade, commerce or business. According to him,

before denying the exemption u/s.11, it has to be ascertained whether the assessee has been applying its profits only and exclusively to the object of the assessee and it is established for this purpose. He relied on the judgement of the Supreme Court in the case of *M/s. Queen's Educational Society vs. CIT in* Civil Appeal No.5167/2008 dated 16th March, 2015. Further, he submitted that activities carried on by the assessee did not fall within the ambit of trade, commerce, business or fall within ambit any activities or rendering any service in relation to trade, commerce or business. Further, he relied on the judgment of Hon'ble Delhi High Court in the case of *India Trade Promotion Organisation vs. Director General of Income Tax (Exemptions) & Others* in W.P.(C) 1872/2013 dated 22.01.2015 for this purpose.

6. On the other hand the ld. Departmental Representative relied on the order of the Commissioner of Income Tax.

7. We have heard both the parties and pursued the material on record. We have carefully considered the rival submissions in the light of the material placed before us and also gone through all the judgments cited by the parties before us. First we take up the legal issue with reference to the jurisdiction of invoking the provisions of

section 263 of the Act by the learned CIT. The scheme of the IT Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to erroneous order of the assessing officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interest of the revenue. As held in the case of *Malabar Industries Co. Ltd., Vs. CIT (243 ITR 83) (SC),* the Commissioner can exercise revision jurisdictional u/s 263 if he is satisfied that the order of the assessing officer sought to be revised is (i)erroneous; and also (ii) prejudicial to the interests of the revenue. The word 'erroneous' has not been defined in the Income Tax Act. It has been however defined at page 562 in Black's Law Dictionary (seventh Edition) thus';

> 'erroneous, adj. Involving error, deviating from the law'.
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> The word 'error' has been defined at the same page in the same dictionary thus:
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> 'error No. 1 : A psychological state that does not conform to Objective reality; a brief that what is false is true or that what is true is false'. At page 649/650 in P. Ramanatha Aiyer's Law Lexicon Reprint 2002, the word 'error' has been defined to mean-
>
> 'Error: A mistaken judgement or deviation from the truth in matters of fact, and from the law in matters of judgement 'error' is a fault in judgement, or in the process or proceeding to judgement or in the execution upon the same,
> in a Court of Record; which in the Civil Law is called a Nullityie" (terms delay).
>
> Something incorrectly done through ignorance or inadvertence S.99 CPC and S.215 Cr.PC.

> Error, Fault, Error respects the act; fault respect the agent, an error may lay in the judgement, or in the conduct, but a fault lies in the will or intention."

8. At page 650 of the aforesaid Law Lexicon, the scope of Error, Mistake, Blunder, and Hallucination has been explained thus:

> "An error is any deviation from the standard or course of right, truth, justice or accuracy, which is not intentional. A mistake is an error committed under a misapprehension of misconception of the nature of a case. An error may be from the absence of knowledge, a mistake is from insufficient or false observation. Blunder is a practical error of a peculiarly gross or awkward kind, committed through glaring ignorance, heedlessness, or awkwardness. An error may be overlooked or atoned for, a mistake may be rectified, but the shame or ridicule which is occasioned by a blunder, who can counteract. Strictly speaking, Hallucination is an illusion of the perception, a phantasm of the imagination. The one comes of disordered vision, the other of discarded imagination. It is extended in medical science to matters of sensation, whether there is no corresponding cause to produce it. In its ordinary use it denotes an unaccountable error in judgement or fact, especially in one remarkable otherwise for accurate information and right decision. It is exceptional error or mistake in those otherwise not likely to be deceived."

9. In order to ascertain whether an order sought to be revised under Section 263 is erroneous, it should be seen whether it suffers from any of the aforesaid forms of error. In our view, an order sought to be revised under Section 263 would be erroneous and fall in the aforesaid category of "errors" if it is, inter alia, based on an incorrect assumption of facts or an incorrect application of law or non-application of mind to something which was obvious and required application of mind or based on no or insufficient materials so as to affect the merits of the case and thereby cause prejudice to the interest of the revenue.

10. Section 263 of the Income-tax Act seeks to remove the prejudice caused to the revenue by the erroneous order passed by the Assessing Officer. It empowers the Commissioner to initiate suo moto proceedings either where the Assessing Officer takes a wrong decision without considering the materials available on record or he takes a decision without making an enquiry into the matters, where such inquiry was prima facie warranted. The Commissioner will be well within his powers to regard an order as erroneous on the ground that in the circumstances of the case, the Assessing Officer should have made further inquiries before accepting the claim made by the assessee in his return. The reason is obvious. Unlike the Civil Court which is neutral in giving a decision on the basis of evidence produced before it, the role of an Assessing Officer under the Income-tax Act is not only that of an adjudicator but also of an investigator. He cannot remain passive in the face of a return, which is apparently in order but calls for further enquiry. He must discharge both the roles effectively. In other words, he must carry out investigation where the facts of the case so require and also decide the matter judiciously on the basis of materials collected by him as also those produced by the assessee before him. The scheme of assessment has undergone radical changes in recent years. It

deserves to be noted that the present assessment was made u/s. 143(3) of the Income-tax Act. In other words, the Assessing Officer was statutorily required to make the assessment under Section 143(3) after scrutiny and not in a summary manner as contemplated by Sub-section (1) of Section 143. Bulk of the returns filed by the assessees across the country is accepted by the Department under Section 143(1) without any scrutiny. Only a few cases are picked up for scrutiny. The Assessing Officer is therefore, required to act fairly while accepting or rejecting the claim of the assessee in cases of scrutiny assessments. He should be fair not only to the assessee but also to the Public Exchequer. The Assessing Officer has got to protect, on one hand, the interest of the assessee in the sense that he is not subjected to any amount of tax in excess of that is legitimately due from him, and on the other hand, he has a duty to protect the interests of the revenue and to see that no one dodged the revenue and escaped without paying the legitimate tax. The Assessing Officer is not expected to put blinkers on his eyes and mechanically accept what the assessee claims before him. It is his duty to ascertain the truth of the facts stated and the genuineness of the claims made in the return when the circumstances of the case are such as to provoke inquiry. Arbitrariness in either accepting or rejecting the claim has no place. The order passed by the Assessing

Officer becomes erroneous because an enquiry has not been made or genuineness of the claim has not been examined where the inquiries ought to have been made and the genuineness of the claim ought to have been examined and not because there is anything wrong with his order if all the facts stated or claim made therein are assumed to be correct. The Commissioner may consider an order of the Assessing Officer to be erroneous not only when it contains some apparent error of reasoning or of law or of fact on the face of it but also when it is a stereo-typed order which simply accepts what the assessee has stated in his return and fails to make enquiries or examine the genuineness of the claim which are called for in the circumstances of the case. In taking the aforesaid view, we are supported by the decisions of the Hon'ble Supreme Court in *Rampyari Devi Saraogi v. CIT (67 ITR 84) (SC), Smt. Tara Devi Aggarwal v. CIT ITR 323) (SC), and Malabar Industrial Co. Ltd's case (243 ITR 83) (SC)*.

11. In Malabar Industrial Co. Ltd. case the Hon'ble Court has held as under:

> "There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall the orders passed without applying the principles of natural justice or

without application of mind. In our humble view, arbitrariness in decision-making would always need correction regardless of whether it causes prejudice to an assessee or to the State Exchequer. The Legislature has taken ample care to provide for the mechanism to have such prejudice removed. While an assessee can have it corrected through revisional jurisdiction of the Commissioner under Section 264 or through appeals and other means of judicial review, the prejudice caused to the State Exchequer can also be corrected by invoking revisional jurisdiction of the Commissioner under Section 263. Arbitrariness in decision-making causing prejudice to either party cannot therefore be allowed to stand and stare at the legal system. It is difficult to countenance such arbitrariness in the actions of the Assessing Officer. It is the duty of the Assessing Officer to adequately protect the interest of both the parties, namely, the assessee as well as the State. If he fails to discharge his duties fairly, his arbitrary actions culminating in erroneous orders can always be corrected either at the instance of the assessee, if the assessee is prejudiced or at the instance of the Commissioner, if the revenue is prejudiced. While making an assessment, the ITO has a varied role to play. He is the investigator, prosecutor as well as adjudicator. As an adjudicator he is an arbitrator between the revenue and the taxpayer and he has to be fair to both. His duty to act fairly requires that when he enquires into a substantial matter like the present one, he must record a finding on the relevant issue giving, howsoever briefly, his reasons therefor. In S.N. Mukherjee v. Union of India AIR 1990 SC 1984, it has been observed by the Hon'ble Supreme Court as follows:

"Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances or arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore, the requirement that reasons be recorded should govern the

> decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge."

12. Similar view was earlier taken by the Hon'ble Supreme Court in *Siemens Engg. & Mfg. Co. Ltd. v. Union of India AIR 1976 SC 1785*. It is settled law that while making assessment on assessee, the ITO acts in a quasi-judicial capacity. An assessment order is amenable to appeal by the assessee and to revision by the Commissioner under Sections 263 and 264. Therefore, a reasoned order on a substantial issue is legally necessary. The judgments on which reliance was placed by the learned Counsel for the assessee also points to the same direction. They have held that orders, which are subversive of the administration of revenue, must be regarded as erroneous and prejudicial to the interests of the revenue. If the Assessing Officers are allowed to make assessments in an arbitrary manner, as has been done in the case before us, the administration of revenue is bound to suffer. If without discussing the nature of the transaction and materials on record, the Assessing Officer had made certain addition to the income of the

assessee, the same would have been considered erroneous by any appellate authority as being violative of the principles of natural justice which require that the authority must indicate the reasons for an adverse order. We find no reason why the same view should not be taken when an order is against the interests of the revenue. As a matter of fact such orders are prejudicial to the interests of both the parties, because even the assessee is deprived of the benefit of a positive finding in his favour, though he may have sufficiently established his case.

13. In view of the foregoing, it can safely be said that an order passed by the Assessing Officer becomes erroneous and prejudicial to the interests of the Revenue under Section 263 in the following cases:

(i) The order sought to be revised contains error of reasoning or of law or of fact on the face of it.

(ii) The order sought to be revised proceeds on incorrect assumption of facts or incorrect application of law. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

(iii) The order passed by the Assessing Officer is a stereotype order which simply accepts what the assessee has stated in his return or where he fails to make the requisite enquiries or examine the genuineness of the claim which is called for in the circumstances of the case.

14. We shall now turn to the facts of the case to see whether the case before us is covered by the aforesaid principles. A perusal of the assessment order passed by the Assessing Officer show that application of mind on his part on the issue of treating the income of assessee from auditoriums and hostel. The evidence available on record is enough to hold that the return of the assessee with reference to this income was objectively examined or considered by the Assessing Officer. It is because of such consideration of the issues on the part of the Assessing Officer that the return filed by the assessee not automatically accepted. The assessment order placed before us was passed after examination or enquiry or verification or objective consideration of the claim made by the assessee. However, the Assessing Officer has omitted to examine the issues relating to accumulation of income. His order is a completely non-speaking order on this issue. In our view, it was a fit case for the learned Commissioner to exercise his revisional jurisdiction under section 263 which he rightly exercised by cancelling the assessment order and directing the Assessing Officer to pass a fresh order considering this issues raised by the CIT. In our view, the assessee should have no grievance in the action of learned Commissioner in exercising the jurisdiction u/s. 263 of the IT Act with reference to this issue.

15. It was however contended by the learned Counsel that the Assessing Officer had taken a possible view in accepting the return of the assessee with reference to the issue raised by the CIT and hence, the Commissioner was not justified in assuming the revisional jurisdiction under Section 263. We have given our thoughtful consideration to the aforesaid submissions. As already stated earlier, an order becomes erroneous because inquiries, which ought to have been made on the facts of the case, were not made and not because there is anything wrong with the order if all the facts stated or the claims made in the return are assumed to be correct. Thus, it is mere failure on the part of the Assessing Officer to make the necessary inquiries or to examine the claim made by the assessee in accordance with law, which renders the resultant order erroneous and prejudicial to the interest of the revenue. Nothing more is required to be established in such a case. One would not know as to what would have happened if the Assessing Officer had made the requisite inquiries or examined the claim of the assessee in accordance with law. He could have accepted the assessee's claim. Equally, he could have also rejected the assessee's claim depending upon the results of his enquiry or examination into the claim of the assessee. Thus, the formation of any view by the Assessing Officer would necessarily depend upon the results of his inquiry and conscious, and not passive, examination into

the claim of the assessee. If the Assessing Officer passes an order mechanically without making the requisite inquiries or examining the claim of the assessee in accordance with law, such an order will clearly be erroneous in law as it would not be based on objective consideration of the relevant materials. It is therefore, the mere failure on the part of the Assessing Officer in not making the inquiries or not examining the claim of the assessee in accordance with law that per se renders the resultant order erroneous and prejudicial to the interest of the revenue. Nothing else is required to be established in such a case to show that the order sought to be revised is erroneous and prejudicial to the interests of the Revenue.

16. Further in the present case, the assessment order 29.12.2011, the Assessing Officer considered the income of Auditoriums as business income and brought the same into taxation. The Commissioner of Income Tax while proceeding u/s.263 of the Act vide order dated 31.03.2014 observed that there was an amendment to section 2(15) of the Act with effect from 01.04.2009. The assessee is engaged in commercial activities in running Kalyanamandapams, Auditoriums, Working Women Hostel and Hostel for Girls which have aimed at advancing ''other objects of general public utility''. In our opinion, this finding of the Commissioner of Income Tax is

unwarranted and the Assessing Officer already brought the entire income from Kalyana Mandapam for taxation in his assessment order. There is no prejudicial to the interest of Revenue though he has not properly applied proviso of Section 2(15) of the Act. The order of the Assessing Officer is erroneous against of wrong assumption of facts. However, it is not prejudice to the interest of Revenue as there is no Revenue loss to the Department. More so, the Commissioner of Income Tax in his order commenting on the order of the Commissioner of Income Tax(Appeals) for the same assessment year stating the Commissioner of Income Tax (A) is not justified in granting exemption u/s.11 of the Act. In our opinion, the Commissioner of Income Tax (Admn) cannot sit on the order of the Commissioner of Income Tax(Appeals) to decide the same issue differently. If the Department is having any grievance it would have filed an appeal before the higher forum. It is not appropriate to Commissioner of Income Tax (Admn) to comment on the order of the Commissioner of Income Tax(Appeals). In our opinion, the issue relating to treating the income from Kalyanamandapams, Auditoriums, working hostel is subject matter of appeal by assessee before the Commissioner of Income Tax (Appeals). The said issue in assessment order merged with the order of Commissioner of Income Tax (Appeals) as a whole hence there was no more amenable to revisional jurisdiction of Commissioner of Income

Tax in view of Explanation (c) of Sec 263 of the Act and to that extent we are not agreeing with the order of Commissioner of Income Tax passed u/s.263 of the Act.

17. Coming to the other point, the issue raised by Commissioner of Income Tax is that the assessee had accumulated a sum of ₹1,23,41,310/- by filing form no.10 for assessment year 2004-05 is as under:-

> ''To purchase land and put the building to establish run or maintain educational, technical or technological institutions of all kinds in India for the benefit of the public''.

It is mentioned in the form No.10 that amount would be accumulated till the previous year ending 31.03.2008. The assessee was required to utilize the accumulated amount during such period. In case of non application of the said accumulated sum for the purpose specified in Form No.10, Section 11(3) gets triggered and it would be taxed in the next year in which such period expired. But in this case, the Assessing Officer has failed to examine this aspect. There was no enquiry with regard to this issue. The order of the Assessing Officer is "erroneous" and 'prejudicial to the interest of Revenue" on the reason that there is wrong assumption of facts. We are inclined to agree with the findings of the Commissioner of Income Tax that Assessing Officer is required to examine this issue afresh and gave a finding on this. Accordingly,

to this extent, we confirm the order of the Commissioner of Income Tax. The issue of application of accumulated income of assessment year 2004-05 within stipulated period i.e. upto 31.03.2008 is to be examined while framing the fresh assessment and decide fresh as directed by Commissioner of Income Tax in his order.

18. In the result, the assessee appeal is partly allowed for statistical purposes.

Order pronounced on Friday, the 15th day of May, 2015, at Chennai.

Sd/-	Sd/-
(चल्ला नागेन्द्र प्रसाद)	**(चंद्र पूजारी**)
(CHALLA NAGENDRA PRASAD)	(CHANDRA POOJARI)
न्यायिक सदस्य/ JUDICIAL MEMBER	**लेखा सदस्य**/ ACCOUNTANT MEMBER

चेन्नई/Chennai.
दिनांक/Dated:15.05.2015.
KV
आदेश की प्रतिलिपि अग्रेषित/Copy to: 1. अपीलार्थी/Appellant 2.प्रत्यर्थी/ Respondent 3. आयकर आयुक्त (अपील)/CIT(A) 4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF.